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# The Scientific and Humane Study of Criminal Law

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## THE SCIENTIFIC AND HUMANE STUDY OF CRIMINAL LAW\*

JEROME HALL\*\*

Criminal law is a perennial plant of ancient origin, found everywhere. It is not uprooted even by the most violent revolutions. For when the catastrophic changes have run their rapid course, the elementary needs of daily life must be attended to and the place of law in the affairs of men receives a measure of the attention that its importance merits. By any standard one may select with reference to law—the security of life and property, the honest conduct of trade, public education, the intellectual character of the problems, dramatic interest and, certainly not last in importance, justice among men—it is the law of crimes and criminal procedure which holds the central position, even if that is not appreciated in most American law schools. We are especially challenged in these latter decades of the twentieth century by the volume of crime in this country as well as by the hazards of living in an emerging international community, to advance our knowledge of criminal law and improve its effectiveness.

We are accustomed to look first, and not without reason, to scientific theories to solve our problems. A scientific theory is to be contrasted with other meanings of that term. For example, the professional literature contains references to “theories” of punishment, which consist of opinions on that subject, supported by more or less persuasive data. Again, what has been called a “finalistic theory” of penal law by European scholars is a general interpretation of criminal law. More significant is the use of the term “theory” to refer to the knowledge of certain common aspects of criminal law, *e.g.*, its division into specific rules and general conceptions, and of common elements of crimes, *e.g.*, an objective element, a subjective element connotating fault, and that of legality.

None of these uses of the term, however, expresses the meaning of

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\* This lecture was given in Boston on April 2, 1962, inaugurating the series of lectures on Criminal Law to be given annually under the auspices of Boston University School of Law.

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"theory" in the current philosophy of science. A theory of physics, *e.g.*, refers to a system of ideas, an organization of propositions so inter-related that the terms are defined by reference to each other. It is this attribute of physics which renders it rigorously scientific, permitting deductive manipulation; and this is extremely important because of the nature of physical data. Without extending the analogy unduly, therefore, the theory of criminal law to be presented here may be said to share this characteristic of being systematic.

In terms of this theory, criminal law consists of propositions of three very different types, each serving essential functions. These propositions are expressed as rules, doctrines, and principles, and each represents progressively wider generalization.<sup>1</sup>

The rules, the relatively narrowest of these propositions, have two functions. First, they state what is unique in each crime. If, *e.g.*, one wishes to know in what respects larceny, embezzlement, murder, treason and so on differ from each other, one consults the rules of criminal law. Second, the rules contain such terms as "any person" and also, various verbs such as "takes," "kills" and so on.

But the rules do not define the whole of any crime, and to provide the entire definition, it is necessary to qualify all the above and similar terms by adding to the rules the more general propositions designated "doctrines."<sup>2</sup> The doctrines concern infancy, insanity, intoxication, coercion, necessity, ignorance of fact and law, attempt, solicitation, conspiracy and complicity. The need to add the doctrines to the rules in order to define the various crimes is evident by reference to insanity or infancy. For, plainly, the definition of larceny, arson and so on in terms of the rules is incomplete since these crimes were not committed if the doer was insane or an infant. What is obvious in these instances is also true of the other doctrines. The doctrines thus supply essential elements that are common in the definition of crimes.

Finally, if one examines this union of the rules and the doctrines with a view to discovering general conceptions running through this body of criminal law, he derives seven fundamental notions—the principles of criminal law, namely, *mens rea*, act (manifested effort), the "concurrency," (fusion), of these two to form criminal conduct, the harm, the causal connection between conduct and harm, the punitive sanction (punishment) and, finally, legality. Thus *mens rea* represents what is common in all the particular mental states specified in the rules, qualified by the relevant doctrines—insanity, infancy, coercion and so on. So,

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<sup>1</sup> Attention is called to the diagram at the end of this paper.

<sup>2</sup> For civilian readers, it should be noted that "doctrine" does not have the meaning to which they are accustomed. As the following text shows, "doctrine" refers to certain propositions of intermediate generality.

too, punishment represents what is common in all the prescribed sanctions, and so on as to the other principles. Since these principles are the ultimate conceptions of penal law, they are the notions in terms of which "crime" is defined; hence the lack of any one of the seven principles means that the relevant datum is not a crime. Lastly, it may be noted that the principles can be given normative form as the most general propositions of penal law; and they may also be stated descriptively to comprise the basic generalizations of a science of criminal law.

In sum, doctrines differ from principles, first, in that doctrines are essential to the definition of crimes while principles are not. Second, principles are much wider generalizations than are doctrines, as may readily be seen if, *e.g.*, the doctrine of insanity is compared with the principle of *mens rea* or the doctrine of attempt is compared with the principle of harm. Third, while the doctrines are general qualifiers of the rules, the principles are the ultimate common conceptions running through this combined totality of rules and doctrines.

There is another interrelationship of these concepts which is also essential in the definition of the principles and, therefore, is that of the specific crimes, namely, a postulated teleological relationship between criminal conduct and harm. In other words, in this theory, criminal conduct is the means employed to effect the harm—the end sought or hazarded; hence each conception must be defined by reference to the other one. So, too, the rational relation of the punitive sanction to the harm brings the sanction into a like relation with the criminal conduct. Finally, the principle of causation, the causal nexus between criminal conduct and harm, signifies cause in the primary, teleological sense of end-seeking, not in that of mechanical causation, although the latter is, of course, assumed to operate in the physical world in which a rational actor causes changes to occur. As suggested, this teleological relationship between the principles is reflected in the meaning of the various crimes, *i.e.*, each instance of criminal conduct is the particular means employed to produce a specific harm.

Because this theory is teleological, it excludes from the criminal law negligent damage and, obviously, conduct that is presently subjected to strict penal liability. This is only the culmination of the long history of advanced legal systems from strict criminal liability to a law which progressively narrowed criminal liability to voluntary harm-doing. That seems clearly to have been the trend of Anglo-American criminal law, and a well-known English scholar states that excepting, perhaps, nuisance and libel, "it should now be recognized that at common law there is no *criminal* liability for harm thus caused by inadvertence."<sup>3</sup>

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<sup>3</sup> Turner, *Kenny's Outlines of Criminal Law* 29 (1952).

The principal reason for excluding negligent damage from criminal liability is, of course, an ethical one.<sup>4</sup> It is that such liability should be based on moral culpability and that implies action, *i.e.*, voluntarily harming a human being. Even if a wider view of morality is taken, the punishment of a human being is so serious a matter that it should be limited to what, in that view, is the grosser sort of immorality expressed in voluntary harm-doing. This is the central truth of Western ethics dating from Plato and Aristotle, it is the heart of Kant's ethics, and it is recognized as well in Oriental ethics. The merit of this principle is tacitly admitted in most of the arguments supporting penal liability for negligent damage. For these advocates consciously or implicitly assimilate that to voluntary harm-doing or they find harmful action somewhere along the causal line. The hard fact is that inadvertence is not awareness; on the contrary, where the one is, the other is not.

Holmes said that even a dog understands the difference between being kicked and being stumbled over, but sophisticated philosophers and persons taken with a psychiatric ideology find reasons to challenge this elementary fact. They assert that there is no important difference between (voluntary) action and (inadvertent) behavior or that psychiatry has established the invalidity of this distinction. This is a phase of a philosophy which views all conduct as determined and, I believe, the fallacy of that has been sufficiently demonstrated. One need only recall that this theory is self-defeating because if all conduct is determined, the theory is itself determined and thus can make no claims to objective truth.

Such psychological persuasiveness as this theory may have probably derives from an increased awareness that emotional drives, adverse conditioning and the consequent misinterpretation of situations produce strong, frequently unconscious motives for criminal conduct. The ethical-legal principle, however, does not imply any innocence of these factors, and the doctrines of ignorance of fact, infancy, insanity, coercion, and so on, as well as the discretion of courts and parole boards comprise the legal basis for a thorough consideration of them. These doctrines and practices do imply that all is not chaos and unreason but, instead, that there are truths about an orderly world as well as an essential difference between thinking about it and not thinking, between awareness and inadvertence, between conduct and behavior. This difference is a fact of life which no amount of sophistication can dissolve.

Legal scholars who advocate the punishment of negligent persons have

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<sup>4</sup> This is discussed in the writer's *General Principles of Criminal Law* (2d ed. 1960) and in his supplementary paper prepared for the meeting of the Association Internationale de Droit Pénal, Lisbon, September, 1961, to be published in a forthcoming issue of *Rev. Intrn'l de Dr. Pén.*

not, to my knowledge, argued that this should extend to negligent misrepresentation, negligently burning a house, negligently taking other persons' property and so on; and, obviously, many difficult problems would be met in any consistent effort to do that. These scholars have, instead, supported certain statutes and the vestiges of criminal liability for negligent damage in various corners of penal law, either in deference to the opinion of legislators, which is really an abdication of critical judgment, or because they believe the punishment of negligent persons has a deterrent effect. Is there, however, any evidence to support this opinion? Such arguments are also apt to confuse negligence with recklessness and to omit any discussion of the relevance of the fact that the deterrent thesis rests on the premise that a prospective criminal will weigh the advantage of his crime against the disadvantage of his more or less probable punishment. If he has the sanction in mind, his conduct is reckless when he acts in a dangerous manner. If he does not have the sanction in mind, how can he be deterred? Conceivably, it might be possible to show that there is some sort of carry-over from punishment for negligence to increased sensitivity, knowledge and skill. But the proponents of penal liability for negligence have not referred to any relevant data despite the fact that the preponderant insistence of the common law on recklessness places a heavy burden of proof upon them. Certainly, the analogy of correcting children daily and on the spot would be far-fetched.

What we frequently have in inadvertent damage is an insensitivity to danger, including that to the negligent person himself. It is a character defect that is probably the product of long conditioning. Accordingly, the argument that these persons "violate their duty in being indifferent to other persons' interests" is ambiguous in the crucial respects relevant to a sound determination of the issue, namely, as regards the meaning of "violate" and "duty." There is a very important difference between the failure to realize potential values—and every thoughtful person recognizes, sometimes painfully, that he falls short of the ideal—and voluntarily harming a human being. The restriction of criminal liability to voluntary, *i.e.*, intentional or reckless harm-doing, would also clarify the public mind regarding crime and the functions of penal law.

This, of course, does not imply that the community should not protect itself from the damage caused by ignorant, awkward or insensitive persons. On the contrary, it should employ all social measures which prevent the damage directly or reach the causes of such dangerous behavior. Stricter licensing and revocation of licenses, the use of administrative boards and educational programs are among the relevant social resources. A solution is not easily found or applied. But in any case, whatever doubts one may have regarding the efficacy of these measures,

it is clear that punishment must rest upon positive moral grounds, not on the uncertainty of non-punitive measures.

The theory of criminal law presented here has been discussed in various places, and the principal issue raised in Continental countries and in others which derive their legal codes from them concerns its exclusion of negligence from criminal fault. Since Continental and derivative codes impose such criminal liability, typically in a few special provisions, the criticism is that negligent behavior is criminal in these instances, yet the above theory does not include that within its orbit. There is no unanimous Continental position on this issue, but it probably does mark one of the greatest divergencies between the principal thrust of Anglo-American criminal law and Continental and derivative criminal law. The question is being discussed in many countries and it was one of the four topics on the program of the recent Lisbon meeting of the Association Internationale de Droit Pénal—indications that there is some doubt among Continental and other scholars about their current law.

This criticism of the theory here presented raises a question of science, indeed, of understanding anything, and especially of the limitations of descriptive theories as well as their advantage over formal theories.<sup>5</sup> Formal theories of criminal law generalize regarding everything labeled a "crime" in the code and statutes, no matter how fortuitous, arbitrary or archaic, and they, therefore, confuse or obscure very important differences. It seems inevitable that many unfortunate consequences result especially because voluntary harm-doing and inadvertent damage are subsumed in a single equivocal term (fault, *Schuld*, *culpa*) suggesting that the entire penal law is based on moral culpability. At the same time, judges speculate on whether defendants "could have" used due care, and the principle of legality is correspondingly weakened.

A theory of law is not invalid because it does not include adventitious, irrational commands within its orbit in such a way as to make it seem that they are the same kind of data that rational laws comprise. A descriptive theory of law represents knowledge of that law, and the fact that in practice and in certain existing codes, negligent damage is held criminal does not prove that a theory which fits only voluntary harm-doing is invalid. It only means that it cannot consistently include the inadvertent behavior which is held criminal in those codes. That prosecutions are initiated, convictions rendered and sentences served for negligent damage, where the current penal law so provides, is well known, as is the fact that, in practice, lawyers must occasionally deal with very arbitrary "commands of the Sovereign." But the merit of a

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<sup>5</sup> Discussed in Hall, *Studies in Jurisprudence and Criminal Theory*, ch. 1 (1958).

descriptive theory as contrasted with formal ones is that it provides the practitioner with the only knowledge by reference to which he can determine his objective and fix his strategy. If, *e.g.*, he is a prosecutor, it clarifies the nature of what he needs to establish and what he does not need to establish under the current law while defense counsel is equipped to examine current law critically, oppose the expansion of unsound law and, of course, participate effectively in a pre-sentence hearing. If, in sum, we have knowledge of the most important part of penal codes and statutes, and refrain from attributing the qualities of those laws to other parts of the codes and statutes which refer to essentially different kinds of data, we secure a solid vantage point from which those currently accepted "crimes" can be soundly analyzed. If, in addition, it therefore becomes possible to state our knowledge systematically in terms of the interrelations of a set of realistic ultimate ideas, we have laid the foundations for fruitful legal and criminological research.

Differences of opinion, which may be expected to persist regarding penal policies, do not alter the nature of knowledge of crime and criminal law. If, as appears evident, it is impossible to produce a descriptive theory which subsumes both voluntary harm-doing and inadvertent damage in a coherent set of realistic terms, the only alternative—if that is possible—is to add a persuasive theory of the penalization of negligent damage to a theory limited to voluntary harm-doing. Not the least benefit of attempts to provide a theory dealing with negligence in terms of its actual characteristics would be to reveal more clearly the grounds upon which such penal liability is based.

In sum, the theory of criminal law presented here builds first upon the core of criminal law, on what is universally recognized as criminal. It thus subsumes the most important part of the present criminal law of all advanced societies and applies as well to minor crimes which conform to the principles specified in the theory. The theory abstracts these essential attributes and organizes them in a system of interrelated propositions. It implies a moral basis for penal liability and thus, among other consequences, it opens a very large area of behavior that is presently held criminal, under some codes, to non-punitive treatment. The theory is realistic in its reference to facts and values since it refers to actual conduct, actual harms and real values. It reveals the interrelated significance of hitherto isolated propositions and problems and provides a set of tools which can be used effectively in the analysis of problems of penal law.

Since the theory is descriptive and normative, it implies that empirical studies and ethical critiques will be carried on to give it maximum significance. The salient advantage in this regard is that the theory reveals the precise relevance of such research and facilitates the systematic



accumulation of the increased knowledge. Since the theory is focused on human conduct, implying personal actors and the mental states they exhibit, on the harms they cause and on the punitive measures that are applied, it is evident that the relevant knowledge is to be found in psychology, sociology and ethics incorporated into socio-legal disciplines.

The normal psychology of the universities is often viewed as a bio-physical science, and the principal subject matter of the social discipline has thus been ignored. To assume that the mind is a mythical ghost-in-the-machine may be an apt hypothesis for some purposes. But it does not lead to knowledge relevant to the problem of determining, *e.g.*, whether a particular person intended to commit a proscribed harm or which degree of criminal homicide was committed. Nor is it very helpful in guiding the wise determination of a sentence, which must take account of the personality of the offender. Fortunately, there has been developing in some departments an integrative view of normal personality which opens the door to a humanistic psychology that is relevant to criminal law.<sup>6</sup> So, too, some promising studies on the psychology of evidence have been initiated at various times; but these have not been carried forward. The psychology of joint criminality, normal suggestibility, racial and cultural animosity operative among gangs and in juvenile delinquency, and many other important aspects of normal psychology also remain unexplored and unadapted to the problem of criminal law.

While normal legal psychology has been neglected, psychiatry has enjoyed a phenomenal development. It is a curious and thought-provoking fact that in no other country in the world has psychiatry assumed the gargantuan proportions attained in the United States. Nor is the propaganda of rich psychiatric institutions carried on elsewhere to any degree remotely approaching that in this country. There are, presumably, many reasons to account for this American phenomenon in addition to the large number of psychiatrists. But they do not dispel troublesome doubts about some aspects of the practice of psychiatry. Certainly no lawyer can view with equanimity the disintegration of the moral foundations of the criminal law by the propaganda of irresponsibility and the irresponsible expansion of the concept of "mental disease." Nor is there much comfort to be derived from the business of trying to persuade Americans that they are mentally disordered and that, no matter how wise they are, they may be impotent to control themselves even with regard to committing the most serious crimes of violence. Although there have been many searching surveys of the legal profession, apparently no one has asked why one of the large foundations

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<sup>6</sup> *E.g.*, Allport, *Becoming—Basic Considerations for a Psychology of Personality* (1955).

has not subsidized such a study to determine the facts and to evaluate the current practices of the psychiatric profession especially in large institutions.

It is unfortunate that the serious challenge of extremist psychiatric philosophers has diverted us from a thorough investigation of the valid uses of psychiatry in criminal law and we are therefore far from having a sound forensic psychiatry. We must nonetheless face the other side of this important question—the fact that many very important advances have been made by psychiatry. We therefore have a difficult dual task—to make use of this knowledge of personality and conduct and at the same time prevent some very articulate psychiatrists from imposing their philosophy of life upon the nation.

To achieve these objectives, what needs first of all to be recognized, especially by psychiatrists, is that moral obligation and attendant legal responsibility are not medical questions. They are ethical, legal questions; and in a democracy, the premise is that the relevant policies are best determined in free discussion by intelligent laymen. I do not mean to imply that psychiatric knowledge and the facts discovered about the personality of accused persons are not relevant to the legal issues. They are indeed both relevant and extremely important. What I have in mind are such questions as the following: Does it make sense for an intelligent person to talk about “right” and “wrong” and “moral obligation”? Ought normal adults who voluntarily commit harms proscribed by penal law be punished? What is fair or just punishment? Should only psychotic persons be absolved from penal liability or should every socio-path and the vast additional numbers who have any kind or degree of “mental defect”—assuming these terms have defensible meaning—also be excused from penal liability?

Equally important is the fact that the questions whether a person is normal and whether a person is so abnormal as to be labelled “psychotic” are not questions regarding which psychiatrists have any expert knowledge. On the contrary, as regards these questions, psychiatrists are no better qualified to pass judgment than is an ordinary clerk or policeman, as one psychiatrist put it.<sup>7</sup> Their expert functions lie in other directions.

Some scholars, including sociologists who usually favor the wide use of social science, have argued that it is a mistake to allow psychiatrists to testify as expert witnesses, that psychiatry has not advanced to the point of warranting the current practice.<sup>8</sup> Although this

<sup>7</sup> Redlich, *Interrelations Between the Social Environment and Psychiatric Disorders* 120 (Milbank Mem. Fund, 1953).

<sup>8</sup> Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 *L. & Contemp. Prob.* 681 (1958); LaPiere, *The Freudian Ethic* 176-77 (1959).

position is understandable in the light of exaggerated claims to scientific status, it does not take account of important advances made in psychiatry. For example, in revealing the actual personality of a defendant, the depth and influence of his emotions and drives, in unmasking disguised motives and rationalizations, in describing the development of mental disorder in conflict situations, and in making available new methods of research, psychiatry has contributed much valuable knowledge. It is not the rigorously organized and objectively verified knowledge found in physical science but is more like the informed insight which an art critic or an experienced doctor acquires through practice. In bringing this kind of knowledge to the attention of judges and juries, able psychiatrists can help them appraise the defendant's personality and conduct correctly. They can assist courts in pre-sentence hearings to determine sentences wisely.<sup>9</sup> And if enough competent psychiatrists were employed in institutions, they could probably raise the level of peno-correctional treatment although that is by no means as certain as we are often led to believe. It is especially in these very large areas that there can be fruitful cooperation between the psychiatric and the legal professions.

I have been discussing the relevance of normal psychology and psychiatry for the principles of criminal law which are represented by the composite conception of criminal conduct. If we attend, next, to the harms produced by criminal conduct, we enter the domain of the sociology of criminal law.<sup>10</sup> As the teleological import of the theory makes evident, however, harm and conduct and likewise, therefore, social situation and personality are intimately inter-connected. Hence the prevalent separation of psychology, especially clinical psychiatry, from sociology is unfortunate and retards the development of the kind of knowledge that is needed, including a socially oriented forensic psychiatry, *i.e.*, knowledge that is relevant to the principles of criminal law.

The study of criminal harms also involves problems of values no less than does that of criminal conduct. Indeed, it is only when the harm is brought into defensible relation with the relevant conduct that the latter becomes morally significant. What is presupposed in one fashion or another is the existence of values as the condition of their being harmed and also as the condition of the evaluation of voluntary harm-doing. So, too, any view of punishment as a rational measure implies a theory of values. The pervasiveness of value through all the

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<sup>9</sup> For a discussion of the merits in this respect of the Model Sentencing Act drafted by the Advisory Council of Judges of the National Council on Crime and Delinquency, see Rubin, *A New Approach to M'Naghten v. Durham*, 45 J. Am. Jud. Soc'y 133 (1961).

<sup>10</sup> Hall, *Theft, Law and Society* (2d ed. 1952).

focal points indicated in the theory influences the construction of relevant social disciplines to take account of the quality of the data of penal law. At the same time, extant contributions show that the humane study of criminal law does not handicap its scientific study. Instead, the two go hand in hand, each supplementing the kind of knowledge the other supplies regarding the essential components of penal law designated by the principles.

Crimes against property are an obvious instance of the need to study relevant social situations if the various harms are to be understood. For example, whether we deal with the larceny of automobiles, furs and jewelry or with receiving stolen property, fraud and other property offenses, the professional conduct of illegitimate business is distinguishable from other types of criminal conduct. What is evident in these crimes applies to all other types of criminality—they, too, occur in, and are influenced by, certain environments and situations. Homicide and incest, *e.g.*, tend to be committed more frequently in certain types of situation than in others. Joint criminality by gangs is accentuated in certain neighborhoods; and the typical conditions of all the other offenses could be similarly recognized. The causal problems are diverse as are those of prevention, treatment and punishment. So, too, the soundness and precision of legislation are determinable by reference to knowledge of the social realities.

This knowledge, in the sociology of criminal law, takes two especially important forms—detailed case-histories of specific socio-legal problems and generalizations, some of which can be stated in very precise terms. The first type of study may be of a specific decision or law or legal change, while the latter take the form of trends, *e.g.*, in the evolution of penal law or of descriptions of co-variation, *e.g.*, of prosecution for certain offenses in relation to certain other variables.

Related to the sociology of criminal law is the cultural history of that law which would provide not only distinctive knowledge of specific changes but also serve the purposes of legal sociology by providing data with reference to which apt generalizations could be discovered. Such a history would take account of philosophical, scientific and ideological thought which has influenced penal law, as well as of economic and political changes. It would raise pertinent questions regarding the comparison of the penal law of democratic societies with that of dictatorships.

As was previously indicated, in terms of the above theory of criminal law any research into treatment or punishment should take account of the relation of the sanction to the harm committed and of that between the harm and the criminal conduct. Research on treatment and punishment should also be venturesome. For example, in many countries the

employment of children between twelve and sixteen seems relevant to a relatively low rate of juvenile delinquency. Without prejudging this, the hypothesis should be explored regardless of our strong preference for universal compulsory education. Thoughtful questions are being asked about juvenile courts, and there is concern for the deprivation of the children's legal rights. But it is extremely difficult to alter the culturally dominant factors which limit the inculcation of social responsibility in children; and apparently little research on this important problem is being done.

What looms large in the current penological horizon are proposals to incarcerate many so-called "anti-social" persons alleged to be recognizable before they commit any crime and to institutionalize many other thousands of convicted persons until psychiatrists certify that they have been "cured." The fact is that such penology rests upon an ideology, not upon diagnosis or knowledge of rehabilitation. What might also be discovered about the probable implementation of such proposals if an investigation into the conditions of mental hospitals were undertaken, is indicated in the statement of a thoughtful psychiatrist that some mental hospitals are more punitive in their treatment than are some penitentiaries in their punishment.<sup>11</sup>

A theory of penal law which views conduct, harm and sanction in rational interrelations does not obstruct the expansion of sound methods of treatment. On the contrary, as was seen with reference to negligent harm-doing, it would narrow the present range of punishment. It would also do that in reliance on psychiatric evidence of the internal conflicts, traumatic experiences, tensions, and abnormalities of personality development in particular cases. There is nothing rigorously moralistic about a theory which makes sense of the responsibility of normal adults, and there is nothing in it that would limit the fullest present consideration of the frailty of human nature in trying circumstances.

In the various ways indicated above, legal psychology, forensic psychiatry, the sociology of criminal law and penology contribute to the clarification and improvement of the criminal law and its administration. It could be shown, also, that these disciplines depend on the theory, *i.e.*, the knowledge, of criminal law to provide the distinctive structure and content which set them apart from general psychology, sociology and so on. This implies that penal theory and these other socio-legal disciplines comprise a single body of knowledge. The difficulties of the problems and the limitations of individual scholars necessitate a division of labor and specialization—in the one case, in the elucidation of the

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<sup>11</sup> Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 Colum. L. Rev. 189, 197 n.21 (1958).

concepts of penal law and, in the other, in the acquisition of empirical knowledge. But the data of these disciplines have common characteristics and the relevant knowledge is unified by reference to a theory of criminal law.

If the addition of still another major task to the already onerous functions of scientific and humane scholarship in this field is permitted, I would urge the thorough study of comparative criminal law. The need for this has long been appreciated in Europe. Indeed, if the desultory, though significant observations of Montesquieu are passed over, the pioneer of modern comparative law was Anselm Feuerbach, a scholar of criminal law. The first chair of comparative law was that in comparative criminal law established for Ortolan in 1848 at the University of Paris. Since then, Continental scholars have become accustomed to studying the criminal law of various countries in the course of their research on their own law. That suggests the immediate purpose of comparative law—to understand one's own law better by viewing it more objectively and learning in the process not only its relative merits but also that much that has been taken for granted is challenged or is non-existent elsewhere. For example, knowledge of the ways in which *mens rea* and criminal fault are defined and treated, different rules regarding criminal attempts, various ways of handling what we call "burglary" and other specific offenses, the absence of felony-murder, misdemeanor-manslaughter rules, and of many other differences stimulates a critical appraisal of the criminal law.

Much food for thought can also be supplied by the scholarly Continental literature on criminal law. This is much more extensive than ours, for, we must remember, in that tradition it is the treatise which has particularly influenced legal practice. Our need to pursue such studies in penal law is insistent because the vast majority of our comparatists specialize in private law. It should be added that it is not only the criminal law and penal theory of other countries that merit study. The progress of forensic psychiatry, penology and other disciplines would also be accelerated by knowledge of foreign contributions.

There are other valuable goals to be pursued in the comparative study of criminal law. For example, among democratic countries there is a wide sharing of values that have been articulated most precisely in their penal laws. The discovery of this cultural unity would have great social as well as scientific significance. Indeed, it may be hazarded that the general progress of comparative law would be accelerated by such study because scholars of criminal law have long been accustomed to draw upon the social sciences and the humanities. A related reason for advancing the comparative knowledge of penal law is the need to provide a viable international law of crimes.

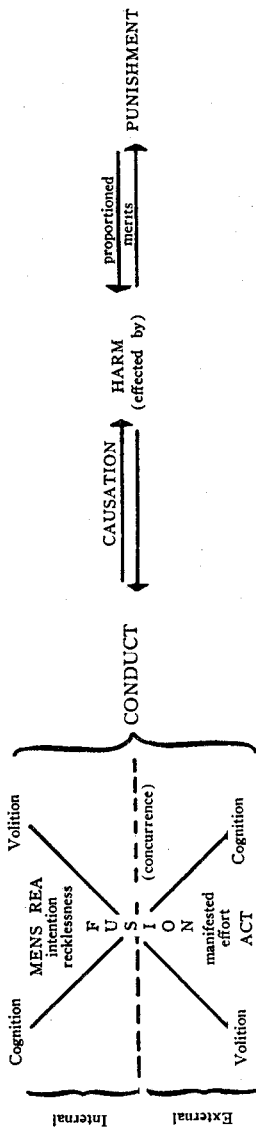
Finally, it should be noted that the common law of crimes is far from playing its proper role in the construction of a sound comparative penal law, as one learns at international meetings. The causes of this are evident—a shared tradition in private Roman law, the ties and limitations of language, the influence of easily transplanted Continental codes, the prestige of scholarly treatises among scholars, and so on. But criminal law is one of the most important parts of any culture, and it would seem that the experience of the Anglo-American peoples especially in this area is worth studying, as is implied, *e.g.*, in the current interest of the Italian government in revising their criminal procedure along Anglo-American lines. It is the common law scholar who, of course, has the primary duty to communicate this knowledge to his civilian colleagues.

This lecture has covered considerable ground and it has been impossible to give any of its subjects due attention. It has seemed to me that a discussion inaugurating this series of annual lectures under the hospitable auspices of Boston University School of Law might serve its purpose in surveying the field and in attempting, also, to organize its far-ranging, apparently diverse subdivisions by reference to a theory of criminal law. Even a specific problem of criminal law raises many questions; and, while the criminal law is not yet as jealous a mistress as one might hope for, those who would prosper in her service must be men “for all seasons,” even though they fall far short of the universality of St. Thomas More.

Far-ranging and difficult as are the problems of criminal law, there are many incentives for scholars who are sensitive to the issues of their times to do even better than their best work. For in this very special century, it is no bit of rhetoric to say that civilization seems at times to totter on the brink of barbarism. The effort to maintain the dominance of reason and decency over passion and destructiveness must be carried on patiently and persistently, with all the resources we can summon. In this struggle, the criminal law has a major contribution to make, one which cannot be made by any other institution. It is a social treasure of inestimable value, expressing the better side of human nature even in the stress of a precarious situation.

# PRINCIPLES

## LEGALITY



(From the combination of rules and doctrines (below), one derives the principles.)

Totality of definitions of all crimes

- Arson
- Assault
- Battery
- Burglary
- Embezzlement
- False pretences
- Kidnapping
- Libel
- Manslaughter
- Murder
- Rape
- Robbery
- Sedition
- Treason
- Misdemeanors
- Etc.

RULES:  
distinctive aspects of  
the specific crimes

all doctrines qualify all rules

- Insanity
- Infancy
- Intoxication
- Coercion
- Necessity
- Ignorance
- Mistake
- Error Juris
- Fact
- Attempt
- Solicitation
- Conspiracy
- Complicity

DOCTRINES:  
essential general aspects  
of the specific crimes

## LEGALITY

Hall, General Principles of Criminal Law (2d ed. 1960)

Diagram by Prof. Jerome Hall, Indiana University, Bloomington, Indiana, U.S.A.  
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